

“Attachment A”
Use of Carbon Offsets under General Plan Goal COS-20 and Its Implementing Policies

In conjunction with recent planning efforts undertaken by the County, it has been asked whether the use of carbon offsets that are not associated with San Diego County-based, offsets-generating projects is consistent with the County’s General Plan, and specifically Goal COS-20 and Policy COS-20.1 therein. As provided below, the proposed Otay Ranch Resort Village’s mitigation framework is consistent with the General Plan because it reduces project-related GHG emissions beyond a level necessary to align with the statewide reduction targets established by AB 32 and SB 32. Goal COS-20 and Policy COS-20.1 do not – and were never intended to – impose any restrictions on the use of all available measures to reduce GHG emissions under the County’s jurisdiction and, for this reason, permit the use of out-of-County offsets as a tool to reduce GHG emissions.¹

Background

In February 2018, the County’s Board adopted its Climate Action Plan (CAP), which “identifies strategies and measures to meet the State’s 2020 and 2030 greenhouse gas (GHG) reduction targets, and to demonstrate progress towards the [State’s] 2050 reduction goal.” (CAP, Chapter ES-1.) At that time, the Board also amended General Plan Goal COS-20 and Policy COS-20.1 – both originally adopted as part of the 2011 General Plan Update – to reflect recent changes in State law. (See the County’s Final Supplement to the 2011 General Plan Update Program EIR (SCH No. 2016101055), pages 1-13 through 1-16.)

When certifying the EIR for the CAP in February 2018, the Board also adopted mitigation measure M-GHG-1, establishing a protocol through which GPA projects may meet a portion of their GHG reduction obligation by purchasing offsets, including offsets that are generated by GHG reduction activities located outside of the County.² M-GHG-1 also establishes the following geographic priorities for GHG reduction features and reduction projects and programs: (1) on-site project design features to reduce GHG emissions; (2) off-site reductions within unincorporated areas of the County; (3) off-site reductions within the County; (4) off-site reductions within the State of California; (5) off-site reductions within the United States; and (6) off-site reductions internationally.

In March 2018, several petitioners filed a lawsuit against the County, alleging that the CAP and, in particular, M-GHG-1 were inconsistent with General Plan Goal COS-20 and Policy COS-20.1. Specifically, the petitioners argued that Goal COS-20 and Policy COS-20.1 require all GHG reductions to occur within the County’s geographical boundaries, and that M-GHG-1 impermissibly allows GPA projects to reduce their GHG emissions through out-of-

¹ This conclusion and the analysis that follows are based on a review of General Plan Goal COS-20 and Policy COS-20.1, as adopted and amended by the Board of Supervisors in 2011 and 2018, respectively. The Board’s General Plan actions taken in 2011 and 2018 were referenced via review of their respective administrative records, hearing transcripts, Board staff reports, minutes, and CEQA documentation.

² The EIR prepared for Otay Ranch Resort Village does not use or rely on mitigation measure M-GHG-1 from the County’s EIR for the CAP. That mitigation measure was designed for projects that increase the density or intensity of development beyond that allowed for by the 2011 General Plan land use framework. As discussed in the Otay Ranch Resort Village EIR (see Section 2.10, Global Climate Change), the Resort Village project proposes development that is consistent with the land use framework established by the Otay Ranch General Development Plan/Subregional Plan, which was approved by the County in 1993 and has been part of the General Plan’s allowed land use framework since that time.

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County offsets. During the litigation, the Office of County Counsel argued that the Board never intended to preclude the use of out-of-County offsets and that the County's long-standing practice has been to allow projects to use out-of-County offsets to mitigate their GHG emissions. In December 2018, the San Diego Superior Court (Judge Timothy B. Taylor, presiding) ruled against the County on this point, finding that Goal COS-20 and Policy COS-20.1 were "fundamental, mandatory, and clear" policies requiring only in-County GHG emissions reductions and foreclosing the use of offsets if such offsets originated outside San Diego County, despite the basic and fundamental fact that GHG emissions and the effects of global climate change are not confined or limited by arbitrary geographic boundaries. (See Judge Taylor's Minute Order, dated December 24, 2018, page 12.)

Out-Of-County Offsets Are Not Precluded by the General Plan

The subject Goal and Policy are set forth below, with underline/strikeout text used to illustrate the modifications to the subject text made by the County in concert with its February 2018 adoption of its CAP.

Goal COS-20 (Governance and Administration)

Reduction of ~~local~~ community-wide (i.e., unincorporated County) and County Operations ~~GHG greenhouse gas~~ emissions contributing to climate change that meet or exceed requirements of the Global Warming Solutions Act of 2006, as amended by Senate Bill 32 (as amended, Pavley. California Global Warming Solutions Act of 2006: emissions limit).

Policy COS-20.1 (Climate ~~Change~~ Action Plan)

Prepare, maintain, and implement a ~~climate change action plan with a baseline inventory of GHG emissions from all sources, GHG emissions reduction targets and deadlines, and environmental GHG emissions reduction measures.~~ Climate Action Plan for the reduction of community-wide (i.e., unincorporated County) and County Operations greenhouse gas emissions consistent with the California Environmental Quality Act (CEQA) Guidelines Section 15183.5.

Before pivoting to the interpretation issue, it is important to reference the defined relationship between Goals and Policies, as described in the County's General Plan on pages I-5 and I-6. As provided therein, Goals describe ideal future conditions for a particular topic, and tend to be very general and broad. Policies provide guidance to assist the County as it makes decisions relating to each goal and indicates a commitment by the County to a particular course of action. While the County has made every effort to provide clear and unambiguous policies, the need for interpretation will inevitably arise.

As to Goal COS-20, the Goal envisions a reduction of GHG emissions associated with activities within the County's control (community-wide activities and County operations). The Goal does not specify how reductions must occur, prohibit certain types of reduction strategies, or mandate project-specific reduction requirements. Indeed, neither Goal COS-20 nor Policy COS-20.1 – in their original or amended forms – discuss offsets or any other form of

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mitigation; nor does the language used prohibit the use of offsets as a method for reducing GHG emissions. In short, Goal COS-20 and Policy COS-20.1 do not dictate how GHG reductions will be achieved.

Instead of placing limits on GHG reduction tools, Goal COS-20 and Policy COS-20.1 more plainly express the County's commitment to reduce GHG from emissions-generating activities under the County's jurisdiction (i.e., those activities located in the unincorporated areas and those activities associated with County government operations). Goal COS-20 and Policy COS-20.1 also express the County's commitment to reduce emissions at a level that meets or exceeds the requirements of the Global Warming Solutions Act (AB 32), as amended by SB 32, which, together, establish statewide GHG reduction targets for 2020 and 2030.

County Precedent for Permitting Out-of-County Offsets

Since 2013, the County has permitted land use development projects to offset their GHG emissions by purchasing offsets.³ This practice was followed when the Board approved the Soitec solar project in February 2015; the Park Circle, Sweetwater Place, and Sweetwater Vistas projects in the fall of 2017; and the Lake Jennings Marketplace project in January 2018. These were not ad hoc decisions or applications of an unarticulated policy. Rather, these project approvals demonstrate that the Board has consistently interpreted Goal COS-20 and Policy COS-20.1, in their original form, to allow out-of-County offsets and intended that such offsets be included in the array of GHG reduction tools available to the County.

Science Does Not Require GHGs to be Reduced at Their Location of Emission

There is no scientific basis for restricting offsets to in-County GHG reduction activities. Climate change is a global phenomenon. While greenhouse gas *emissions* are local, their climate change impacts are not. In fact, climate change impacts are so globally-dispersed that it is nearly impossible to calculate the *local* climate effects of *local* greenhouse gas emissions.

Scientists are not the only ones who understand the *global* – as opposed to *local* – character of climate change. The California Supreme Court understands this issue as well:

[B]ecause of the global scale of climate change, any one project's contribution is unlikely to be significant by itself ... [T]he global scope of climate change and the fact that carbon dioxide and other [GHG], once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local. For many air

³ The use of offsets was formally permitted under the County's 2013 *Guidelines for Determining Significance and Report Format and Content Requirements for Climate Change* ("Climate Change Guidelines"), which expressly allowed offsets as mitigation for GHG impacts and identified a number of County-sanctioned offset registries, all of which offer out-of-County, out-of-state, and international offsets. Although the 2013 Climate Change Guidelines were later set aside as part of the 2012 CAP litigation, they nevertheless demonstrate that the County, since at least 2013, intended to include out-of-County offsets as one of the mitigation tools available to reduce GHG emissions within the County's jurisdiction.

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pollutants, the significance of their environmental impact may depend greatly on *where* they are emitted; for [GHG], it does not.

(*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 219-220; emphasis in the original.) The last sentence in the above quote warrants close examination. It says the significance of GHG impacts does *not* depend on where the GHG is emitted. Thus, it logically follows that *mitigation* for such impacts also does not depend on – and need not take place – where the GHG is emitted.

Former Board Supervisor Roberts made this same point during the February 14, 2018 Board hearing regarding the CAP:

[GHG] is not the same as air quality. Air quality is a localized issue ... But fundamentally, [GHG] is different. If I can reduce [GHG] emissions on the North Pole, then just as good for the planet. It doesn't make a difference. I need to be able to verify that I'm actually getting real reductions. Don't know that there's many emissions on the North Pole, so it's probably not a good example, but I keep hearing it's got to be done in San Diego County. The priority should be get it done, period. If we can go to Imperial County and we can develop a [carbon offset] program with people – the farmers in Imperial County, do it. As long as it's verifiable, we can certify, and we can – we know it's sustainable.

(Transcript of February 14, 2018 Board of Supervisors meeting, pages 125-126.)

The key, then, is to address climate change and GHG on a global level, and to accept the scientific fact that one metric ton of GHG emitted in San Diego, California has the same impact on global climate change as one metric ton of GHG emitted in London, England. Likewise, the elimination of one ton of GHG in London (or anywhere else in the world) produces the same mitigation benefit *locally* as the elimination of one ton of GHG in San Diego.

State Law and Policy Support the Use of Out-of-County Offsets

Significantly, Goal COS-20 is expressly linked to the operative legislation for the establishment of statewide GHG reduction targets – AB 32 and SB 32.⁴ The County purposefully linked its Goal to this legislation to ensure it would have all tools available from the State to reduce GHG emissions. One such tool is the use of offsets. Consistent with the referenced legislation, numerous State laws and policies support the use of out-of-County offsets, examples of which are summarized in abbreviated form below:

- ✓ CEQA Guidelines section 15126.4(c), developed in concert by the California Natural Resources Agency and Governor's Office of Planning and Research, allows for the use of offsets to mitigate GHG and imposes no geographic hierarchy or restrictions on available GHG mitigation tools.

⁴ Policy COS-20.1 is intended to "assist the County as it makes decisions relating to each goal and indicates a commitment by the County to a particular course of action." (General Plan, page 1-5.) As such, like Goal COS-20, Policy COS-20.1 should be interpreted and implemented via reference to the cited legislation.

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- ✓ The California Air Resources Board (CARB) most recently recommended the use of offsets as a potentially feasible mitigation measure for project-level CEQA analysis in Appendix B of its 2017 Scoping Plan, which was developed and approved by CARB in furtherance of attaining SB 32's 2030 statewide reduction target. While CARB expressed a preference for in-State reduction opportunities, CARB – the State agency responsible for California's climate change laws and policies – does not impose hardline geographic limitations on the tools and methods for reducing GHG emissions.
- ✓ CARB has determined that AB 900 projects (which are designated "environmental leadership development projects" under CEQA and subject to judicial streamlining (see Pub. Resources Code, §§21178-21189.3)) can achieve the statutorily-mandated no net increase GHG level through the purchase of offsets without imposing rigid, quantitative limits on the locational attributes of such offsets. While more recent AB 900 projects have committed to a preference for local reduction opportunities (using verbiage similar to that used by the County), no quantitative mandates are associated with that preference and the ultimate portfolio of procured carbon offset credits is subject only to feasibility principles. (See EIR Appendix C-26, *Survey of Locational Performance Standards Used by AB 900 Projects*, for additional details on CARB's standards.)
- ✓ CARB's Cap-and-Trade Program allows regulated entities (which typically are large stationary source emitters, like fuel refineries) to achieve a portion of their GHG reductions through the use of non-local offsets.⁵
- ✓ The California Department of Fish and Wildlife, with the support of CARB, approved the Newhall Ranch project, which relies on non-local GHG reduction opportunities to achieve net zero GHG emissions from a large-scale (more than 20,000 residential units and 9 million square feet of non-residential development) planned community.
- ✓ AB 32 and SB 32, as codified in the Health & Safety Code (see, e.g., Health & Saf. Code, §38505(k)), specifically support the use of market-based compliance mechanisms, such as transactions in offsets. As such, in promulgating its Cap-and-Trade Program for stationary sources under AB 32, CARB

⁵ Note that the carbon offsets purchased by the proposed Otay Ranch Resort Village would be from the voluntary marketplace (because the project is not a regulated entity covered by and subject to CARB's Cap-and-Trade Program).

The County notes that entities regulated by the Cap-and-Trade Program have direct operational control of the long-term GHG emissions from the source profile, whereas land use developers do not have continuing control and authority over many (if not all) of the sources (e.g., homeowners decide when to turn appliances on and off; business owners decide their hours of operation).

The County further notes that covered entities (e.g., fuel refineries) regulated by the Cap-and-Trade Program are not required to achieve a net zero GHG emissions level. Rather, such entities are subject to a declining GHG emissions cap that gradually and incrementally reduces emissions from the regulated emissions-generating activities (see https://www.arb.ca.gov/cc/capandtrade/guidance/cap_trade_overview.pdf). Covered entities are permitted to emit a certain, positive quantity of GHG emissions, unlike the proposed project, which would achieve a net zero GHG emissions level in order to avoid a cumulatively considerable contribution to global climate change.

These important distinctions between the Cap-and-Trade Program's covered entities and the proposed Otay Ranch Resort Village are important factors to be considered when designing the project EIR's framework for the reduction of GHG emissions.

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permits a portion of a covered entity's mandated emission reductions to be secured through out-of-State offsets.

The absence of any absolute prohibition on the use of international offsets also is consistent with the policy and intent underlying the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998), which recognizes that developed countries (like the United States) should provide resources, financial and otherwise, that enable the abilities of developing countries to reduce GHG emissions and adapt to the effects of climate change.

Balancing General Plan Policies: Addressing Housing Shortage While Reducing GHG Emissions

The General Plan's Conservation and Open Space (COS) Element states that, according to the San Diego Association of Governments (SANDAG), "the population of the San Diego County region will grow 38 percent by 2030, resulting in nearly four million people." (General Plan COS Element, page 5-33.) To accommodate this anticipated growth, SANDAG, through the State-supervised Regional Housing Needs Assessment (RHNA), has allocated 22,412 residential units to the County for the current housing cycle, which runs through the end of 2020. (General Plan Housing Element, page 6-2.) To meet its RHNA allocation, the County must approve projects capable of generating 22,412 dwelling units by 2021; and, these units must cover a wide range of housing types and costs, as they must serve each income level. (General Plan Housing Element, page 6-2.)

The General Plan's Housing Element recognizes that some of the largest impediments to meeting the RHNA housing requirement are governmental constraints, including those that are intended to protect the environment. (See General Plan Housing Element, page 6-5.) The County also must contend with infrastructure limitations, such as the lack of sewer service, when deciding how best to meet its housing needs. This difficult balancing act is described on page 6-6 of the Housing Element.

It is well-documented that there is a significant housing shortage in the County. During the Board's February 14, 2018 hearing, each member of the Board discussed the housing shortage in the context of the CAP. Perhaps the most direct statement on the issue came from Board Chair Gaspar, who linked the housing shortage to the County's continuing inability to meet its RHNA allocation:

But at the end of the day, I'm concerned about a number of things, such as implementation itself, the costs involved, consumers and residents, and impacts of the CAP on our housing shortage, which is a crisis ... Looking at our regional housing needs assessment [RHNA], or some would call the [UNINTELLIGIBLE] numbers, we are way behind in meeting our mandated affordable housing for the San Diego Region ... In our 10-year housing cycle, which states 2010 to 2020, we were allocated 22,412 units. We are eight years in and nearing the conclusion of this housing cycle, and we built a total of 4,644 units out of 22,412. And ladies and gentlemen, these units do not just go away.

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(Transcript of February 14, 2018 Board of Supervisors meeting, page 107.) Board Chair Gaspar's concerns were echoed by Supervisors Jacobs (see pages 112-113), Roberts (pages 128-129), and Cox (pages 139-140).

One example of the adverse environmental consequences of the housing shortage is the documented inter-regional commute patterns of San Diego's employees that reside in Riverside County.⁶ If the County does not meet the demand for housing in the San Diego region, the Board should expect for home buyers and renters to continue to look beyond the County's borders for attainable housing, thereby serving to increase vehicle miles traveled, GHG emissions and commute time when compared to in-County housing opportunities. This outcome is incompatible with and contrary to an underlying premise of the County's General Plan, which is to strive for a future that advances not only a "healthy environment" but also "the social well-being of the County's residents." (General Plan, page 1-16.) Exporting affordable residential opportunities to outside of the County of San Diego, therefore, runs afoul of the General Plan's mission to serve the well-being of the County's constituents.

When evaluating claims that a particular decision is inconsistent with the applicable general plan, California courts accord substantial deference to the agency in question, in part because the agency, in attempting to implement the various policies of the general plan, must balance the many competing obligations those policies must satisfy. (See, e.g., *Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807.) Moreover, the Board is legally entitled to interpret its various policies, especially those that may be in tension with one another, in such a way that advances each to an acceptable – though not equivalent – degree. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1268-1269 ["Balance does not require equivalence, but rather a weighing of pros and cons to achieve an acceptable mix."].)

As these cases demonstrate, the County's Board has the legal right to balance the need for more housing against the need for GHG reductions. And, in this instance, access to and use of out-of-County offsets are critical to the County's effort to balance the need for GHG emissions reductions against the competing need for additional housing in the unincorporated areas of the County.

Conclusion

Based on the factual record, legal precedent and policy prerogatives described above, the County does not intend for and does not interpret General Plan Goal COS-20 and/or Policy COS-20.1 (in either their original or amended forms) to prohibit the use of out-of-County offsets as a GHG reduction tool.⁷

⁶ See, e.g., ABC 10 News, San Diego, "Making it in San Diego: SD police officers can't afford housing, commuting from Riverside County" (January 22, 2019), available at <https://www.10news.com/news/making-it-in-san-diego/making-it-in-san-diego-sd-police-officers-cant-afford-housing-commuting-from-riverside-county>.

⁷ Even if Goal COS-20 is erroneously interpreted as requiring reductions through local measures only, Mitigation Measures M-GCC-7 and M-GCC-8 in the Otay Ranch Resort Village EIR require that the County and project applicant follow and enforce a geographic priority system with respect to the purchase of carbon offsets, with the highest level of priority afforded

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to local offsets. These Mitigation Measures require the applicant to exhaust all feasible and available offset opportunities from the higher priority geographic category before utilizing offsets from the next category. And, these priority categories are only triggered after the implementation of Environmental Design Considerations and Mitigation Measures to directly reduce GHG emissions on-site. Given that an infeasibility determination is necessary to utilize offsets from a lower locational priority, the applicant's use of a lower locational priority beneficially replaces a determination that further mitigation is infeasible.